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FILED
MAR 28 1984
ALEXANDER L. STEVAS,
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No. 83-226

IN THE

# Supreme Court of the United States

October Term, 1983

STATE OF ARIZONA,
*Petitioner,*

v.

DENNIS WAYNE RUMSEY,
*Respondent*

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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# BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

## STATEMENT OF THE INTEREST OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

1. The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

2. Since 1967, the Legal Defense Fund has provided representation and advice in capital cases nationwide, regardless of the defendant's race, because of our conviction that the death penalty is customarily applied in a discriminatory manner, and this discrimination is rooted in the very nature of the death penalty.

3. Legal Defense Fund attorneys appeared as amicus curiae on behalf of the class plaintiffs in Knapp v. Cardwell, 667 F.2d 1253 (9th Cir), cert. denied 103 S.Ct. 473 (1982), and presently represent individual death-sentenced prisoners in Arizona, and assist other lawyers representing condemned men throughout the state.

4. Legal Defense Fund attorneys also represent individuals in other states whose cases may be affected by the

decision in this case. These include capital defendants who have appealed life sentences, relying on this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), and persons who have been sentenced to death under statutes which share features of Arizona's law which we believe are unconstitutional, and may be implicated by the decision here.

5. Because the Court's decision in this case may speak to constitutional issues upon which the lives of these Legal Defense Fund clients depend--and because their situation differs from that of the respondent here--we seek to be heard on their behalf.

6. Consent has been given by petitioner and respondent for the filing of this Brief amicus curiae, by letters which have been lodged with the Clerk.

## OPINIONS BELOW

The two Arizona Supreme Court opinions in this case are both reported. State v. Rumsey (I), 130 Ariz. 427, 636 P.2d 1209 (1981); State v. Rumsey (II), 136 Ariz. 175, 665 P.2d 48 (1983). They are also set out in full as appendices to the Petition for Certiorari in this case. For the Court's convenience, they are referenced both places throughout this Brief.

## STATEMENT OF THE CASE

The petitioner in this case has skewed the facts to support its position, to an extraordinary extent. We do not mean to usurp the respondent's function and correct all the petitioner's errors; but we are compelled to alert the Court to three crucial aspects of the proceedings below which have not been fairly represented to it, and which bear directly on the issues presented in this case.

A. The First Sentencing Verdict.

The trial court's first special verdict reached an explicit finding that "no aggravating circumstances exist" in this case. J.A. 57. The petitioner says "the trial court decided that ... although the murder-robbery was committed for pecuniary gain that statutory circumstance was not applicable to Rumsey ...." Pet. Br. 4-5.

That is grossly misleading. This is what the trial court's only finding on this point actually says:

> 5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In this regard, the Court does not agree with the State's interpretation of A.R.S. 13-703(F)(5) and State v. Madsen filed March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.

J.A. 54-5. The special verdict contained similar findings on each of the Arizona statutory aggravating factors. J.A. 53-58. Nowhere in the record of this case is there any finding, prior to the state's appeal, "that Rumsey committed the crime for pecuniary gain." Pet. Br. 19.[1]

B. The State's Cross Appeal.

The second point we think needs clarification is the nature of and basis for the State's appeal from the original judgment. Petitioner's Brief says "the State appealed from the imposition of a

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[1] The trial court did say, in imposing its robbery sentence, "the Defendant planned this robbery ... in order to obtain ... a few hundred dollars ...." J.A. 66. It said nothing there, or elsewhere, about any "pecuniary gain" motive for the homicide, however.

Even in its second sentencing verdict, after the remand, the trial court simply cited the Arizona Supreme opinion to support its "pecuniary gain" finding. J.A. 119-20. It never discussed the evidence on this point; but there was some evidence, in Rumsey's confession, that the homicide was unplanned and unintended. RT 6/4/80 at 56-62.

life sentence" (Pet. Br. 6), and the suggestion that Arizona law allows such an appeal underlies petitioner's claim that the trial and appeal of an Arizona capital case are part of a "single procedure." Pet. Br. 29-31.

In fact, as the Arizona Supreme Court's first opinion in this case notes, the sole basis for the State's appeal here was A.R.S. §13-4032(4), which permits an appeal from "[a] ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment." State v. Rumsey (I), 636 P.2d 1209, 1213 (Ariz. 1981); Pet. App. A 36-37. The state court's second opinion makes clear this was the only possible basis under Arizona law for such an appeal.

> the state is not permitted an appeal unless the defendant has appealed. A.R.S. §13-4032(4). This, of course, is inconsistent with the state's "single procedure" argument.

State v. Rumsey (II), 665 P.2d 48, 55 n.10 (Ariz. 1983); Pet. App. A 19.[2]

C. The Remand And Resentencing.

The third area in which Petitioner's Brief is critically misleading is its description of the Arizona Supreme Court's first remand, and the resentencing that followed from it.

It is simply untrue that on remand "[t]he only thing left to do was correct the trial court's error." Pet. Br. 20. The state court's reversing decision "remanded for a redetermination of aggravating and mitigating circumstances and resentencing." State v. Rumsey (I), supra, 636 P.2d at 1214; Pet. App. A 39. Though petitioner suggests that Arizona

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[2] In light of this holding, we cannot understand Petitioner's statement that "[t]he Arizona Supreme Court has not yet determined whether the State can appeal a life sentence where the defendant does not appeal." Pet. Br. 29.

law subjects an erroneous sentence to "a correction [which] will not allow the state to regroup and try once more to prove its case of death" (Pet. Br. 32), the state court below said that to so limit a resentencing hearing would require it to reverse its past decisions and "rewrite the statute." State v. Rumsey (II), supra, 665 P.2d at 56; Pet. App. 22.

A full scale resentencing is what the remand allowed, and what occurred here. At the resentencing, the prosecutor did not argue simply "that the trial court was free to find that the crime had been committed for pecuniary gain ...." Pet. Br. 7. The prosecutor argued that the trial court should find all three of the statutory aggravating circumstances it had

previously rejected. J.A. 82-91.[3] He also pointed to additional allegations against the defendant which had not been presented at the original sentencing at all (J.A.80-81),[4] which he asked the court to consider in "determining whether the original life sentence was inappropriate" (J.A. 110).

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[3] The prosecutor did not argue the court "was free to find" the "pecuniary gain" aggravating circumstance, but "that the Supreme Court has indicated [it] applies in this particular matter." J.A. 91. The trial court's finding appears to accept this as mandated. J.A. 119-120, 131.

[4] The new information was submitted by the prosecution as part of its presentencing memorandum, and consisted of two indictments--one in Indiana and one in Arizona--charging the defendant with other crimes. Ibid. The Indiana case involved a crime the defendant allegedly committed before his arrest in this case; the charge in Arizona, an incident after his imprisonment. J.A. 98. Neither indictment was ever tried. Ibid.

It was on these facts--not petitioner's hypotheticals--the Arizona Supreme Court unanimously held the double jeopardy clause had been violated.

## ARGUMENT

### I. THE ARIZONA SUPREME COURT CORRECTLY HELD THAT WHAT HAPPENED IN THIS CASE--A RETRIAL AFTER AN EXPLICIT ACQUITTAL--SQUARELY VIOLATES THE FIFTH AMENDMENT

We do not believe that, once the facts of this case are understood, it presents a close double jeopardy question. The unanimous decision of the court below, that Bullington v. Missouri forbids what was done here, is clearly correct.

Indeed, we believe that what was done in this case--the reversal of a fact finding and judgment against the state, because of a later-discovered legal error violates the Fifth Amendment under any analysis. Both the majority and dissenting opinions in Bullington support the judgment below.

A. The Proceedings In This Case Violated Double Jeopardy Principles Accepted By Both The Majority And Dissenting Justices In Bullington v. Missouri.

The double jeopardy question presented by this case is not nearly as close as that in Bullington v. Missouri. Bullington required the application of longstanding double jeopardy principles to the novel implications of a capital sentencing decision, under a statute enacted to comply with Furman v. Georgia, 408 U.S. 238 (1972). This case presents a much more conventional double jeopardy problem: the finality of an explicit finding, in a bench trial, that a factual element of the prosecution's case has not been proven. Neither the majority nor dissenting Justices in Bullington doubted that such a finding in a criminal case . cannot be relitigated.

Certainly, as the court below found, no distinction between the Arizona and Missouri sentencing proceedings justifies a departure from Bullington here. In Arizona no less than Missouri, a sentencing hearing in a capital case is "itself a trial on the issue of punishment so precisely defined by ... statut[e]." Bullington v. Missouri, 451 U.S. at 438.

In Missouri, as the Bullington Court noted,

> counsel make opening statements, testimony is taken, and evidence is introduced, the jury is instructed, and final arguments are made. The jury then deliberates and returns its formal punishment verdict.

451 U.S. 438 n.10. At an Arizona sentencing hearing, too, "evidence relevant to aggravating or mitigating

circumstances is presented,"[5] and "[t]he

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[5] The Petition for Certiorari in this case informed the Court that "there are seldom live witnesses in an Arizona sentencing hearing" (Cert.Pet. 15); Petitioner's Brief here implies the same thing. Pet. Br. 24-6. To the contrary, live witnesses are the rule, not the exception, in capital sentencing proceedings in Arizona. See State v. Lee, 559 P.2d 657, 662 (Ariz. 1976); State v. Morales, 587 P.2d 236, 245 (Ariz. 1978); State v. Bishop, 576 P.2d 122, 128 (Ariz. 1978); State v. Brookover, 601 P.2d 1322, 1325 (Ariz. 1979); State v. Evans, 606 P.2d 16, 17 (Ariz. 1980); State v. Arnett, 608 P.2d 778, 780-81 (Ariz. 1980); State v. Madsen, 609 P.2d 1046, 1054 (Ariz. 1980); State v. Ceja, 612 P.2d 491, 492 (Ariz. 1980); State v. Steelman, 612 P.2d 475, 478 (Ariz. 1980); State v. Gretzler, 612 P.2d 1023, 1055 (Ariz. 1980); State v. Bishop, 622 P.2d 478, 480 (Ariz. 1981); State v. Greenawalt, 624 P.2d 828, 849 (Ariz. 1981); State v. Watson, 628 P.2d 943, 945 (Ariz. 1980); State v. Smith, 638 P.2d 696, 697 (Ariz. 1981); State v. Ortiz, 639 P.2d 1020, 1034 (Ariz. 1982); State v. Carriger, 645 P.2d 816 (Ariz. 1982); State v. McMurtrey, 664 P.2d 637, 645 (Ariz. 1983); State v. Smith, 665 P.2d 995, 1002 (Ariz. 1983).

parties are entitled to rebut and argue."[6] State v. Rumsey (II), supra, 665 P.2d at 53; Pet. App. A 14. In Arizona, no less than Missouri, "[t]he burden of establishing the existence of aggravating circumstances is on the prosecution," the court "return[s] a special verdict setting forth its findings," "[t]here are but two alternatives--life imprisonment or death," and "[s]pecific instructions are given with regard to the final conclusion to be reached." Ibid. The Arizona Supreme Court was thus clearly correct that "Arizona procedure ... closely resembles a trial" within the meaning of Bullington. Id. at 665 P.2d 53; Pet. App. A 15.

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6 While suggesting Arizona lawyers do not argue sentence (Pet. Br. 22), petitioner itself describes the kind of "'argument on the evidence and the applicable law in his favor,'" Herring v. New York, 422 U.S. 853, 860 (1975), quoting Yopps v. State, 178 A.2d 879, 881 (Md. 1962), which is part of any bench or jury trial. Pet. Br. 25-26. Such argument was presented in this case. J.A. 11-51.

It is true that, in Arizona, like Missouri, sentences of death are subject to review by the Arizona Supreme Court, which has reversed some death sentences as disproportionately severe. Pet. Br. 26-27. Missouri law contains a similar, more elaborate appellate review provision. Revised Statutes of Missouri 1978 §565.014(3).[7] But that hardly means the sentencing hearing, in either Arizona or Missouri, is simply "the beginning of a winnowing process ...." Pet. Br. 28.

As we noted above, the Arizona Supreme Court in this very case explicitly rejected the suggestion that "the state can appeal a death sentence if it is illegal" and that "the state can appeal a

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[7] The Arizona Supreme Court's review powers are not granted by statute, but were undertaken in light of this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976). See State v. Richmond, 560 P.2d 41, 51 (Ariz. 1976).

life sentence where the defendant does not appeal." Pet. Br. 29. State v. Rumsey (II), supra, 665 P.2d at 55 n.10; Pet. App. A 19.

> While we have an independent duty of review, we perform it as an appellate court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty. Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51... Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id.

Id. at 665 P.2d 55; Pet. App. A 20-21 (footnote omitted).

> [T]he Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by utilization of this court's appellate process ....

Id. at 665 P.2d 55; Pet. App. A 22. That settled the Arizona law on this question.

The Missouri procedures followed in Bullington, and the Arizona law applied here, do differ in two substantial respects. First, Arizona does not allow a jury trial on the existence of aggravating circumstances which make the crime subject to death, or on the issue of sentence itself. A.R.S §13-703(C). Second, the Arizona statute is mandatory: if the trial court finds an aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency," there is no discretion; the sentence "shall" be death. Ibid.

We believe both of these features raise serious questions about the constitutionality of the Arizona death penalty law. See Part II, below. But whether or not these features separately render this law unconstitutional, they certainly do not alleviate the double jeopardy problem in this case.

Clearly, there is no double jeopardy significance to the fact that an Arizona capital sentencing hearing is heard by a judge instead of a jury.

> For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See United States v. Morrison, 429 U.S. 1, 3, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976) .... "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge." Id. at 3, 97 S.Ct. at 26 (quoting United States v. Jenkins, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250 (1975)).

State v. Rumsey (II), supra, 665 P.2d at 54; Pet. App. A 18-19. That is established beyond doubt.[8] Even the petitioner does not seriously argue that the identity of the fact finder alone is

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8 See, e.g., Tibbs v. Florida, 457 U.S. 31, 41 (1982); Sanabria v. United States, 437 U.S. 54, 64 n.18 (1978); Burks v. United States, 437 U.S. 1 (1978); Serfass v. United States, 420 U.S. 377, 388 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971); Fong Foo v. United States, 369 U.S. 141 (1962).

sufficient to distinguish this case from Bullington.

Neither is the only other unique aspect of Arizona law: that "the trial court is required to impose a sentence of death if the state proves the existence of one or more aggravating factors and the defendant fails to prove any mitigating factors ...." Pet. Br. i. To the contrary, the crux of the Bullington decision was the fact that Missouri law required the sentencer "to determine whether the prosecution has 'proved its case,'" Bullington v. Missouri, supra, 451 U.S. at 444, and did "not giv[e] unbounded discretion to select an appropriate punishment from a wide range authorized by statute," id. at 438.

In this respect, Arizona's sentencing procedure resembles an ordinary criminal trial more closely than Missouri's. In Bullington, the Court noted that

> A Missouri jury is instructed that it is not compelled to impose a death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances.

451 U.S. at 434-35. An Arizona sentencing judge has no such sentencing discretion. See State v. Rumsey (II), supra, 665 P.2d at 53; Pet. App. A-15.

This aspect of the Arizona law eliminates the major objection of the dissenting Justices in Bullington. An Arizona sentencer clearly has no function "to mete out just deserts as he sees them." 451 U.S. at 450 (dissenting opinion of Justice Powell). That means that any Arizona decision against death must constitute a finding "that the State adduced insufficient evidence"--because an Arizona trial court cannot "choose life imprisonment rather than death even if it found beyond a reasonable doubt that the

State had proved the existence and gravity of [aggravating] ... circumstances." Id. at 452 n.4.

It is because of this feature of Arizona law--and its application in this case--that we believe the petitioner's formulation of the issue here is fundamentally flawed. As we have pointed out above, Rumsey's trial court did not simply pronounce sentence; it delivered a verdict which included findings of fact explicitly rejecting the State's contentions. That verdict said "the defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value" (J.A. 54) (emphasis added); and "no aggravating circumstances exist" (J.A. 57).

That verdict was not just an "implicit acquittal;" it was an explicit acquittal, by definition:

> "the ruling of a judge, whatever its label, actually represent[ing] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."

United States v. Scott, 437 U.S. 82, 97 (1978), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Whether or not that acquittal resulted from a misinterpretation of Arizona law, it is no less final for double jeopardy purposes.

> The Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.

Tibbs v. Florida, supra, 457 U.S. at 41.

> "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See Fong Foo v. United States, 369 U.S. 141, 143, [7 L.Ed.2d 629, 82 S.Ct. 671]. If the innocence of the accused has been confirmed by a final

> judgment, the Constitution conclusively presumes that a second trial would be unfair." Arizona v. Washington, 434 U.S. at 503, 54 L.Ed.2d 717, 98 S.Ct. 824.

United States v. DiFrancesco, 449 U.S. 117, 129 (1980). A "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." Sanabria v. United States, 437 U.S. 54, 69 (1978). Even though "an acquittal on the question of guilt or innocence does not necessarily mean that the State adduced insufficient evidence, ... yet such acquittals are final." Bullington v. Missouri, supra, 451 U.S. at 452 n.4 (dissenting opinion of Justice Powell).

This case does not, therefore, reraise the difficult questions first decided in Bullington. The trial court did not simply decide sentence here.

Sitting as finder of fact, it found the defendant had not committed the kind of a crime that Arizona law says is punishable by death. An appeals court later decided that in so finding, the trial judge misread the law, and ordered a new trial. Long before Bullington it was settled that the Fifth Amendment bars such relitigation of a criminal case, even where it is clear that an "acquittal was based on an egregiously erroneous foundation." That is all the Court need reaffirm here.

B. There Is No Reason To Overrule Bullington v. Missouri.

The petitioner sought certiorari in this case based on supposed differences between the Arizona and Missouri death sentencing statutes, which it claimed distinguished Bullington v. Missouri. See Cert. Pet. i, 9, 28. Having failed to establish those distinctions, it now says

"[t]his case is a good opportunity ... for the Court to reassess its holding in Bullington." Pet. Br. 33.

We disagree. We think there is no occasion here to reassess Bullington at all, because the decision below would stand under the analyses of either the majority or dissenting Justices there. If we are wrong, and the Court finds that this case is indistinguishable from Bullington, Bullington should be reaffirmed. Nothing in petitioner's arguments, and nothing that has happened since justifies its overruling now.

We recognize that the Court was closely divided in Bullington, and there were strong arguments on both sides of the issue in that case. We believe the majority decision in Bullington was correct. But that is not the issue now. The issue now is, if the Court finds Bullington indistinguishable from this

case, is there a reason to discard that major constitutional precedent, a scant two years after it was made.

We think there is not. Certainly, the difficult distinctions between Bullington and DiFrancesco which petitioner points to (Pet. Br. 33-34), are nothing new: they were fresh in the Court's mind, and the focus of the Court's analysis, in Bullington itself.

Nor have any difficulties arisen in lower courts with Bullington's application which justify its reexamination. At the time it was decided, the Bullington majority decision was already in accord with all the state courts, other than Missouri's, which had considered the question under modern statutes in recent

years.[9] Bullington's affirmance of that position as a matter of federal constitutional law caused no major disruption, and has been followed by lower courts without notable confusion.[10]

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[9] Sanne v. State, 609 S.W. 2d 762 (Tex.Crim.App. 1980); Commonwealth v. Littlejohn, 443 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal.Rptr. 77 (1963); Roberson v. State, 258 So.2d 257 (Fla. 1971); State v. Washington, 380 So.2d 64 (La. 1980); Ward v. State, 236 S.E.2d 365 (Ga. 1977).

[10] In only one case, previous to this, has an issue arisen under Bullington which this Court found sufficiently important to warrant its attention. Estelle v. Bullard, 457 U.S. 1116 (1982). That issue was mooted when the state court decided independently to follow Bullington's lead as a matter of independent state constitutional law. Ex parte Augusta, 639 S.W.2d 481 (Tex. Crim. App. 1982); see Estelle v. Bullard, 103 S.Ct. 776 (1983); Bullard v. Estelle, 708 F.2d 1020 (5th Cir. 1983).

Bullington also remains fully consistent with the Fifth and Eight Amendment decisions this Court has rendered since. The line between Bullington and DiFrancesco remains clearly marked by the "qualitative difference between death and any other permissible form of punishment," Zant v. Stephens, 51 U.S.L.W. 4891, 4897 (June 23, 1983), the "substantive limitations on the ... factors that a capital sentencing jury may consider in determining whether death is appropriate," California v. Ramos, 51 U.S.L.W. 5220, 5223 (June 28, 1983), and the need to "minimiz[e] the risk of wholly arbitrary, capricious, or freakish sentences" in capital cases, Pulley v. Harris, 52 U.S.L.W. 4141, 4143 (January 23, 1984).

There simply are no "'lessons of experience,'" United States v. Scott, supra, 437 U.S. at 101, which should call

Bullington's rule, so recently settled, into question. Absent some compelling reason to reexamine so new and important a precedent, principles of stare decisis cry out against it.

Stare decisis considerations are especially weighty in the context of this issue: for Bullington's rule is one which fixed legal relationships and informed legal decisions in matters of life and death. Bullington removed from our law "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might ... [lead] to a retrial and death sentence." Fay v. Noia, 372 U.S. 391, 440 (1963). It would be truly ironic if, after it had been relied on, Bullington was suddenly discarded now.

Rumsey's counsel's reliance on Bullington, to the near exclusion of all other defenses at the resentencing hearing

below (J.A. 95-107), is illustrative. So, too, are the cases petitioner has pointed to (Cert. Pet. 9-10 n.1) where defendants have received life sentences and appealed, assured by Bullington that to do so does not jeopardize their lives. Basic principles of fairness cry out against suddenly retracting that assurance.

> If the doctrine of stare decisis has any meaning at all, it requires that people in the everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance.

United States v. Mason, 412 U.S. 391, 399-400 (1973). That must be doubly true where the penalty is death.

Bullington has been decided. This Court did not grant certiorari to reconsider it, and it should not entertain that suggestion now.

## II. SEPARATE CONSTITUTIONAL QUESTIONS ARE ALSO RAISED BY THE STRUCTURE OF THE ARIZONA DEATH SENTENCING STATUTE.

We recognize that certiorari was granted here solely on the double jeopardy issue this case presents. We are constrained, however, to call the Court's attention to two additional constitutional issues submerged in the proceedings in this case.

We mention these because of a concern that, in describing the legal matrix from which the double jeopardy issue here arises, the Court might appear to place its imprimatur on the Arizona death sentencing law itself. We are convinced the two major aspects of that procedure which distinguish it from the Missouri statute considered in Bullington are both, themselves, constitutional defects.

These two aspects of Arizona law distinguish it, not just from the law of

Missouri, but from every other statute this Court has examined since Furman v. Georgia, 408 U.S. 238 (1972). Arizona totally excludes the jury from the sentencing stage of capital cases, and Arizona makes the death sentence mandatory on the sentencing judge, upon certain findings of fact. This Court's cases since Furman, and centuries of precedent regarding the role of juries in criminal cases, raise serious questions about the constitutionality of both of these features of this law.[11]

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[11] Respondent Rumsey raised constitutional challenges to both these aspects of the Arizona law, in his appeal below. Appellant's Opening Brief, State v. Rumsey, Ariz. Sup. Ct. No. 5042-2, pages 21-22. The state court did not reach the issue in this case, because of its decision on the double jeopardy issue. It has upheld the statute against similar challenges in other cases, however. See, e.g., State v. Jordan, 672 P.2d 169 (Ariz. 1983).

A. The Exclusion Of The Jury From Its Traditional Fact Finding Role In Capital Cases.

Arizona is one of five states which, after Furman v. Georgia, supra, enacted laws which removed the jury from the death sentencing process.[12] The constitutional validity of such statutes remains unsettled. Proffitt v. Florida, 428 U.S. 242, 252 (1976); Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

Arizona law denies capital defendants more than just jury sentencing, however. In Arizona the judge alone decides whether a murder involves any of the aggravating

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[12] The other four states are Idaho (Idaho Code §19-2515), Montana (Montana Code Ann. §46-18-301), Nebraska (Neb. Rev. Stat. §29-2520) and Oregon. The Oregon statute has been held unconstitutional because of its restriction of the jury function. State v. Quinn, 623 P.2d 630, 644 (Or. 1981). Prior to Furman, every state had authorized jury sentencing in capital cases. McGautha v. California, 402 U.S. 183 (1971).

facts which make it a capital crime under Arizona law. A.R.S. §13-703(C). Those "aggravating circumstances" are, for all practical purposes, elements of capital murder in Arizona.[13] See Jurek v. Texas, 428 U.S. 262, 271 (1976).

This withdrawal of the right to jury trial on these facts squarely contravenes the Sixth Amendment, and a bedrock principle of our legal system:

> The trial of a criminal case places the fact finding function in a jury of twelve unless by statute or consent the jury is fixed at a lesser number or a jury is waived.

Press Enterprise v. Superior Court, Riverside County, 52 U.S.L.W. 4113, 4114

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[13] Under ARS 13-703(E), a finding of "one or more of the aggravating circumstances enumerated in subsection F" requires a death sentence if "there are no mitigating circumstances sufficiently substantial to call for leniency." Aggravating circumstances must be established by competent evidence, and must be proven beyond a reasonable doubt. ARS §13-703(C); State v. Jordan, 614 P.2d 825, 828 (Ariz. 1980).

(January 18, 1984). Justice Story called "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." United States v. Battiste, 2 Sumner 240, 243 (1835).

The rule predates our Constitution. It was settled in England by 1613. Isaack v. Clark, 1 Rolle 126, 135 (1613).[14] It came to America shortly thereafter:

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[14] See Thayer, A Preliminary Treatise on Evidence at Common Law 185 (1898). The principle appears to have been established even earlier than this. "Mr. Hallam, in his Constitutional History of England ... said that as early as the reign of Henry VII one of the essential checks upon royal power was that 'the fact of guilt or innocence on a criminal charge was determined in a public court ... by a jury of twelve men ....'" Maxwell v. Dow, 176 U.S. 581, 609 (1900) (dissenting opinion of Justice Harlan). See also Fortescu, De Landibus Legum Angliae (1468), reprinted in Carpenter and Stafford, Readings in Early Legal Institutions 347 (1932).

> The first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths."

Maxwell v. Dow, supra, 176 U.S. at 609 (dissenting opinion of Justice Harlan).[15]

Lord Coke's latin phrasing became the accepted rule of English law:

> Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores.

W. Forsyth, History of Trial by Jury 259 (1852). That rule was the foundation of the historic decision in Bushell's Case, 6 Howard State Trials 999, Vaughn's Rep. 135

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[15] See also Heller, The Sixth Amendment to the Constitution of the United States 16 (1951). The same appears to have been the law in the other colonies. See, e.g., Scott, Criminal Law in Colonial Virginia 86-87 (1930).

(1670), that jurors could not be imprisoned for "falsely" acquitting:

> That decantatum in our Books, Ad quastionem facti non respondent Judices, ad quastionem legis non respondent Juratores, literally taken is true: for if it be demanded, what is the fact? the judge cannot answer it ....

Id. at Vaughn's Rep. 149.

The rule was settled by the 18th Century, and acknowledged by Blackstone.[16] Lord Mansfield called it "the fundamental definition of trial by jury." Proceedings Against The Dean of St. Asaph, 21 Howells State Trials 847, 1039 (1783).

> It may safely be said that at the time of the American Revolution the general principle was well established in English law that "juries must answer to questions of fact and judges to questions of law.

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> [T]he founders of the English law have with excellent forecast contrived ... that the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.

4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed. 1900) (emphasis added).

This is the fundamental maxim acknowledged by the constitution."

Scott, Trial by Jury and the Reform of Civil Procedure, 31 HARV.L.REV. 669, 679 (1918). That maxim underlay the "insistence on jury trial" in the first Congress, which led to the Bill of Rights. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV.L.REV. 49, 74-5 (1923). As Justice Powell has noted, in criminal cases it has been "steadfastly adhered to" ever since. Powell, Jury Trial of Crimes, 23 WASH. & LEE L.REV. 1, 5 (1966).

Arizona's break from this tradition is particularly drastic, because the facts it leaves to the judge include those which "go to the criminal acts for which the defendant is to be punished." State v. Quinn, supra, 623 P.2d at 644. Some of those--like the "pecuniary gain" allegation here--involve questions of mens

rea; but it has always been thought that

> [w]here the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury.

Morrissette v. United States, 342 U.S. 246, 274 (1952).

Arizona has "redefin[ed] the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment," Mullaney v. Wilbur, 421 U.S. 684, 698 (1974), to reverse five centuries of Anglo-American law which reserves all rulings on the existence of such elements to a jury of lay citizens. The validity of that action should not be assumed in deciding this case.[17]

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17 A related, but different, issue regarding the jury function in capital cases is presently before the Court as one of the issues presented in Spaziano v. Florida, No. 83-5596

B. The Mandatory Nature Of Arizona's Death Sentencing Statute.

The second troublesome and unique feature of the Arizona law is its mandatory sentencing formula. As we noted above, the statutory language is clear.

> The court ... shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and there are no mitigating circumstances sufficiently substantial to call for leniency.

ARS §13-703(E). The Arizona Supreme Court has taken this literally:

> "where one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty."

State v. Jordan, supra, 672 P.2d at 173, quoting State v. Gretzler, 659 P.2d 1, 13, cert. denied 103 S.Ct. 2444 (1983).

This statute shares with those of a number of other states the questionable placement on the defendant of "the burden of proving that the death penalty was

inappropriate in his particular case." Jones v. Illinois, 78 L.Ed.2d 264, 265 (1983) (Justice Marshall, dissenting from denial of certiorari). Its unique characteristic is its mandatory nature. In that feature it clearly departs from what this Court has said a capital punishment statute must do.

> What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977); Gregg, supra, at 197 (plurality opinion); Proffitt v. Florida, 428 U.S., at 251-252 (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion).

Zant v. Stephens, supra, 51 U.S.L.W. at 4895 (original emphasis).

> Once the jury finds that the defendant falls within the leglislatively defined category of persons eligible for the death penalty ... the jury is then free to consider a myriad of factors to

> determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

California v. Ramos, supra, 51 U.S.L.W. at 5225.

Arizona law does not permit individualized capital sentencing decisions. It mandates a death sentence whenever any statutory aggravation is found, unless the defendant establishes, by a preponderance of the evidence, the existence of mitigating circumstances sufficient to "warrant leniency." A.R.S. §13-703(C).

Justice Stevens pointed out the dangers inherent in such a statutory sentencing formula, in his separate opinion in Smith v. North Carolina, 61 U.S.L.W. 3418 (November 30, 1983). Addressing a less restrictive statute than this, he noted that the sentencer

> might answer both of [the statutory] ... questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, supra, 438 U.S. at 601 (plurality opinion), quoting Woodson v. North Carolina [supra, 428 U.S. at 305].

Ibid.

By mandating the death penalty whenever a single aggravating factor is proven, unless the defendant proves sufficient mitigation to overcome it, we believe the Arizona statute creates an unacceptable "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (concurring opinion of Justice O'Connor), quoting Lockett v. Ohio, supra,

438 U.S. at 605. Whether that we are correct in that belief remains to be decided. We point it out here lest the Court appear to decide it, in addressing the double jeopardy question that has arisen from its application in the particular circumstances of this case.

## CONCLUSION

Respondent Rumsey's resentencing to death, after the trial court had found all statutory aggravating circumstances absent in his case, clearly violated the Fifth Amendment. The decision of the court below should be affirmed.

Respectfully submitted,

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March 28, 1984